1997

State of Utah v. Miguel Angel Flores : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Appellee,	:	Case No. 970215-CA
v.	:	
MIGUEL ANGEL FLORES,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS FOR MURDER, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-203 (SUPP. 1997), AND AGGRAVATED ARSON, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-103 (1995), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE SANDRA N. PEULER, PRESIDING

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (Supp. 1995), and aggravated arson, a first degree felony, in violation of Utah Code Ann. § 76-6-103 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Sandra N. Peuler, presiding. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j)(1996).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Was the evidence sufficient to convict defendant of aggravated arson? The reviewing court "will reverse a jury verdict for insufficient evidence `only when the evidence . . . is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.'" State v. Germonto, 868 P.2d 50, 55 (Utah 1993) (quoting State v. Verde, 770 P.2d 116, 124 (Utah 1989); State v. Petree, 659 P.2d 443, 444 (Utah 1983).

2. Did the trial court properly deny defendant's motion for

a mistrial based on prosecutorial misconduct? "On appeal from a denial of a motion for mistrial based on prosecutorial misconduct, because the trial court is in the best position to determine an alleged error's impact on the proceedings, we will not reverse the trial court's ruling absent an abuse of discretion." State v. Hay, 859 P.2d 1, 6 (Utah 1993).

3. Should this Court consider a challenge to a guilty plea taken in strict compliance with the requirements of rule 11, Utah Rules of Criminal Procedure, raised for the first time on appeal? Because defendant raises this issue for the first time on appeal, it is a matter for this Court's discretion.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following determinative statutes and rules are set out in Addendum A:

Utah Code Ann. § 76-6-103(1)(b)(1995);
Utah Code Ann. § 77-17-7(1)(1995);
Rule 11, Utah Rules of Criminal Procedure

STATEMENT OF THE CASE

Defendant, Miguel Angel Flores, was charged with aggravated arson (Arson Pl. 7-11) and murder (Murder Pl. 3-8).[1] Following a

[1] The aggravated arson and murder charges were filed as separate cases, to wit: case no. 961900814 and case no. 961900905, respectively (Arson Pl. 3, 20; Murder Pl. 3, 30) and consolidated for appeal (See Murder Pl. Clerk Index, p. 1). Although the cases were consolidated, the pleadings files have been independently paginated, and only the first page of each transcript of the various proceedings in each case has been paginated. Therefore, each citation to the record will identify by name the specific case or by number the first page of the specific proceeding, plus page number, e.g., Aggravated Arson Pleadings File as "Arson Pl. 3" or Change of Plea Hearing as "R.

jury trial, defendant was convicted of aggravated arson (Arson Pl. 90). Defendant thereafter pleaded guilty to murder (Murder Pl. 57-58). The trial court sentenced defendant on both convictions to statutory five-to-life terms in the Utah State Prison, to be served consecutively (Arson Pl. 96; Murder Pl. 76). The murder sentence was enhanced with a one-year term for the use of a firearm and a four-year term for the commission of the offense in concert with two or more persons, all enhancements to be served consecutively (Murder Pl. 77, 78, R. 136 [15]). Defendant appealed his convictions to the Utah Supreme Court, which poured-over the two cases to this Court (Arson Pl. 99, 120, 123; Murder Pl. 85).

STATEMENT OF THE FACTS

The Aggravated Arson

On February 18, 1996, Mary Archuleta resided at 1259 West 500 South in Salt Lake City, with her nine-year old grandson, Joseph Guerrero, her cousin, Candido Herrera, a friend, Jacquie Anderson, and Ms. Anderson's boyfriend (R. 131 [70, 92]). None of them had any gang affiliation (R. 131 [70-71, 103]). Mary and Joseph were sleeping in her bedroom, upstairs (R. 131 [72, 94]). Mary was awakened by the sounds of smoke detectors, fire alarms, and breaking glass (R. 131 [73, 88-89, 94-95]). Mary saw her

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101 [6]."

china cabinet on fire and heard windows cracking from the fire (R. 131 [75]). Joseph ran to his aunt's house next door and called 911 (R. 131 [95]). Jacquie's boyfriend extinguished the fire with a pan of water (R. 131 [76]). Nonetheless, the fire melted the Venetian blinds and burned the walls and ceiling in the vicinity of the china hutch (R. 131 [81-84]). The window in Candido's bedroom was broken (R. 131 [84]).

Just after the fire was extinguished, the police and fire departments arrived at the scene. At that time Mary discovered broken bottles and smelled gasoline, and in her bathroom was a bottle labeled "Ice 800," containing gasoline, depicted in State's exhibit 22 (R. 131 [85-88]. Candido was covered with gasoline from his chest down (R. 131 [86]). His bed was also covered with gasoline, and among the broken bottles covering the floor there was an intact quart-sized beer bottle filled with gasoline, pictured in State's exhibits 17 and 18 (R. 131 [87, 105, 107-09, 111]). After calling 911, Joseph returned to his grandmother's house and saw rags all over the ground in both the front and back of the house, and broken bottles and a bottle of gasoline in his own room, and burned rags in front of the house and beneath the bathroom and bedroom windows (R. 131 [96-97]). Neither Mary nor Joseph nor Candido saw those who besieged their home (R. 131 [90, 100, 114]).

Officer Jeff Payne of the Salt Lake City Police Department

was the first official on the scene (R. 132 [255]). He observed broken windows in the front and rear of the house, charred pieces of cloth around the house, a broken "Ice" beer bottle in the bathroom and an unbroken quart-sized Miller beer bottle in the bedroom (R. 132 [256-62]).

Jeffrey Long, an experienced fire investigator with Salt Lake City Fire Department investigating the scene, found broken glass from a beer bottle and remnants of a burnt wick behind Mary Archuleta's china closet, where most of the burning occurred (R. 132 [274-75]). Inside the house he smelled gasoline in the bathroom, bedroom and on Mr. Herrera's body (R. 132 [280-83]). The broken "Ice" bottle (State's Ex. 26) and the Miller bottle (State's Ex. 27) were tested and found negative for fingerprints and positive for gasoline (R. 132 [287-89). Based on his investigation, Long concluded that the fire at the Archuleta residence was intentionally set to burn the entire house down by the use of four incendiary devices constructed of gasoline-filled bottles with wicks (R. 132 [290]). He also concluded that if all four incendiary devices had gone off, "the structure would have probably been fully involved and compromised to the point where it would have collapsed probably before the fire department got there." He further concluded that Mr. Herrera would have had little chance of surviving, considering the placement of the devices and his dousing with gasoline (R. 132 [291-92]).

Testimony of Melissa Chacon

On the night of February 15, 1996, Davin Trujillo, a member of the King Mafia Disciples gang, was shot in the head, by a member of the rival Avenues gang (R. 131 [120-21]). According to Melissa Chacon, who "hung out" with the King Mafia Disciples gang from 1992 until 1996 and had the street name of "Queen Mafia Disciple," defendant, Cameron Lopes, and Collin Carter were members of the King Mafia Disciples gang (R. 131 [116-19]). Two nights later, on February 17, these three gang members met at Wanda Fox's apartment to make plans to retaliate for Trujillo's shooting (R. 131 [123-26]). Others were also present, including Chacone, Wanda Fox, David Samora and Gus Dutson; however, only Flores, Dutson, Lopes, Carter and Samora were involved in the discussion to retaliate against Adam Archuleta, whom they suspected of the shooting (R. 131 [125-31]). Dutson suggested that they fire bomb Archuleta's house (R. 131 [127]).

Dutson told Samora to go outside and get some bottles. In response, Samora went out and returned with Miller, quart size beer bottles (R. 131 [132]). It was now about 1:00 a.m., February 18 (R. 131 [132]). At Dutson's request, Fox and Samora went out and returned about one-half hour later with a container of gasoline (R. 131 [133]). In the interim, the gang members watched television, drank, and ate (R. 131 [133]). When Fox and Samora returned with the gas, defendant, Lopes, Carter, Dutson,

and Samora retreated to a bedroom for about an hour, though Samora was soon ejected (R. 131 [134]). Upon exiting, the four went into the bathroom with the four quart bottles and the container of gasoline (R. 131 [135]). Dutson then retrieved an old T-shirt from Fox's bedroom, tore it up, and returned to the bathroom (R. 131 [135-36]). Meanwhile, Chacon and Fox watched the television (R. 131 [135-36]). Soon afterward, the four men exited from the bathroom with half-filled bottles of gasoline with rags in them. Chacon testified that one of the bottles was accurately depicted in State's exhibit 18 (R. 131 [136-37]). All four also tried on gloves and masks which she and Dutson had purchased, and then took them off (R. 131 [137-38]). Then, at about 3:00 a.m., the four men left the apartment, each carrying one of the gasoline-rag soaked bottles (R. 131 [138-39]).

About one-half hour later, they all returned. Dutson said that his bottle had gone in the front window and "went off" (R. 131 [139]). Defendant said he was on the side of the house, but was not sure whether or not his bottle went off (R. 131 [140]).

On cross examination, Chacon denied participating in the fire bombing plan, though she realized the gang members' intentions when Samora returned with the beer bottles and, later, the gasoline (R. 131 [151]). Chacon thought there were three Miller bottles and one little regular beer bottle, the brand of which she did not recall, although she later recalled on redirect

examination that State's exhibit 22 showed the smaller gasoline-filled beer bottle (R. 131 [153, 162-63]). She admitted that unless she cooperated with the State she would lose custody of her daughter (R. 131 [154-55]). However, she repeatedly testified, on redirect and recross examination, that she would not tell a lie to protect herself from prison or to protect her daughter who was in safe hands (R. 131 [159, 163]). She also acknowledged that she had been charged with aggravated arson and murder and that in exchange for her truthful testimony at trial she had agreed to plead guilty to conspiracy to commit murder and to pay restitution and waive her right to bail and a speedy trial in both the arson and murder cases, with the expectation that the State would amend the conspiracy charge to be a second degree felony, dismiss the aggravated arson charge, and recommend probation instead of prison commitment (R. 131 [156-59]).

On redirect, Chacon also testified that her agreement in the plea bargain was to testify truthfully, even if it showed her in a bad light, and that she was aware that she might go to prison for lying (R. 131 [160-61]). Chacon acknowledged that on February 18, she considered defendant a friend (R. 131 [161]).

Testimony of David Samora

David Samora first met defendant at Wanda Fox's apartment right after the Trujillo shooting, which angered defendant (R. 131 [166, 178]). He admitted that his memory of the evening

before the fire-bombing was fuzzy, but that he did not recall seeing defendant at Fox's apartment the night before the bombing (R. 131 [168-69, 174, 176]). On that occasion he was asked to get some gasoline, although he did not recall being asked to get any bottles (R. 131 [169]). He and Fox got the gasoline at a 7-Eleven store (R. 131 [175]). Upon returning to Fox's apartment, he went into a bedroom where he recalls Carter, Lopes, Chacon, and Dutson talking about a cocktail bomb; however, upon the occupants' request, he soon left and went to sleep in another room (R. 131 [175-77]). On cross examination, he acknowledged that he was testifying with immunity (R. 131 [179]).

Testimony of Wanda Fox

Wanda Fox was acquainted with the King Mafia Disciples gang, and knew defendant, Carter and Lopes to be members (R. 131 [181]). Early on the morning of February 18, 1996, defendant, Lopes, Dutson, Carter, Chacon, and Samora were in her apartment (R. 131 [182-83]). With her $3 or $4 from Chacon, Fox and Samora went to get gasoline from a 7-Eleven store, although she did not know its purpose (R. 131 [184, 186]). Samora handed the gas to one of those present, and they went into the bathroom with it and shut the door (R. 131 [187]). She went into the living room and watched television, and Samora went into her bedroom and slept (R. 131 [187]). Somewhat later, she saw defendant, Carter, Lopes and Dutson emerge from the bathroom, wearing masks and gloves,

each holding 32-ounce bottles of gasoline with rags sticking out of them. She knew it was gasoline from the smell (R. 131 [188-89]). The four men left the apartment, reappearing, defendant among them, at about 4:00 a.m. (R. 131 [189-91]). When Chacon asked "if they did it," Lopes responded, "Yes, we did" (R. 131 [190]). Fox testified that she had never discussed the incident with any of those in her apartment that night (R. 131 [191-92]).

On cross-examination, Fox testified that on the night of February 17, people were partying and drinking (R. 131 [193-95]). Defendant appeared between 11:00 p.m. and midnight (R. 131 [195]). At some point in the evening she heard people, including Dutson and Chacon, talking and expressing their anger about the Trujillo shooting (R. 131 [195]). Fox denied knowing the purpose of the gasoline until she saw the four men come out of the bathroom wearing masks and gloves and carrying the gasoline-filled bottles (R. 131 [196-97]). Fox acknowledged that she was not charged with aggravated arson (R. 131 [199]).

On redirect, Fox testified that she had voluntarily gone to the police with her story, that she had not been offered anything for her testimony, and that she was testifying truthfully (R. 131 [199-201]). She again testified that on the night of the incident defendant left her apartment with a gasoline-filled bottle containing a wick, which he and the others had made, and that he returned with the others after having been gone for an

hour (R. 131 [101-02]).

On recross examination, Fox emphatically denied that she told her story to police to assert her innocence and avoid prosecution (R. 131 [202-03]).

Testimony of Gustave Dutson

Gustave Dutson had been a member of the 700 Block Bloods, a gang that later joined with the King Mafia Disciples (R. 132 [210-11]). He identified defendant, Lopes, and Carter as a members of the King Mafia Disciples gang (R. 132 [212-13]). He also identified Davin Trujillo as a member of the King Mafia Disciples gang and stated that Trujillo's shooting angered both defendant and him (R. 132 [214, 218]).

Within two or three days after the incident, Dutson, Chacon, Smith, Carter, Lopes, and defendant decided to retaliate by fire bombing a house on 5th South belonging to the Avenues gang (R. 132 [218-20]). In aid of their plan, Dutson and Chacon bought masks and gloves at various local stores a day or two before the incident (R. 132 [220]).

On the night of February 17, 1996, Dutson and his cohorts were partying and getting drunk at Fox's apartment (R. 132 [221]). At about 1:00 a.m. or 2:00 a.m., while in the bedroom, they decided to put their plan into action (R. 132 [221-22, 226-27]). Dutson was certain that defendant was present (R. 132 [222]). Their plan was to drive to the alley behind the house,

spread out with each conspirator targeting a different window, and simultaneously throw their fire bombs (R. 132 [226-27]). Each of the four conspirators would have a lighter and one gasoline-filled bottle (R. 132 [227]). Neither Fox nor Samora participated in the planning (R. 132 [224, 228]).

Fox and Samora went to get the gasoline (R. 132 [222]). The conspirators' planned to put the gasoline into empty quart-sized and 40-ounce beer bottles lying around the house (R. 132 [223]). When Fox and Samora returned with the gasoline, he, defendant, Lopes, and Carter started filling the bottles in the bathroom (R. 132 [223-24]). These "Molotov cocktails" were constructed by filling the bottles almost to the top and then tightly stuffing into the openings rags made of "towels or something" (R. 132 [225]). Dutson's bomb was made of a gasoline-filled 40-ounce "St. Ives" or "Ice 800" beer bottle (R. 132 [228]). Each conspirator, including defendant, made his own incendiary device, carried his own lighter, and each carried his own incendiary device directly to Fox's mother's car (R. 132 [228-29]).

Defendant drove while the others laid down, out of sight (R. 132 [230]). They took the gloves to hide their fingerprints and the masks to hide their faces, but they were not wearing the gloves or masks when they left the apartment, having hidden them in their clothes (R. 132 [230-31]). Dutson confirmed that the house they drove to and firebombed was the Archuleta home (R. 132

[232]).[2]

Upon arriving, they all ran down the alley to a garage shed on which Dutson wrote gang symbols (R. 132 [226, 233]). Dutson then went around to the front porch, lit the rag in his bottle, and threw it through a closed window (R. 132 [233-35]). At the same time the other conspirators spread out to the back windows (R. 132 [234]). Dutson's bottle broke the window and started a fire (R. 132 [235]). He also heard what he assumed to be the sound of breaking windows from the back of the house (R. 132 [235]). Then they all ran back to the car, got in, and drove back to Fox's house (R. 132 [236-37]). While in the car, each of the conspirator's, including defendant, asserted that each of their fire bombs had gone into the house and started a fire, and they bragged, "Yeah, we got them punks" (R. 132 [237]).

After the incident, but before he was arrested, Dutson told Chacon what had happened (R. 132 [240-41]). Dutson testified that he considered defendant a friend and a gang associate, that loyalty is an attribute of gang membership, and that he never discussed with anyone pinning the blame on defendant (R. 132 [238-42]). Dutson also disclosed that in exchange for the State's agreement to amend an aggravated arson charge from a first degree felony to attempted aggravated arson, a second

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[2] Dutson testified that State's Exhibit 1, previously identified by Mary Archuleta as a chart of her home (R. 131 [71]), as the house he and his cohorts fire bombed (R. 132 [232]).

degree felony, to dismiss another charge, and to recommend probation instead of prison, he would testify truthfully (R. 132 [242-43]). The State also agreed to inform Dutson's sentencing judge of his extraordinary service in testifying in this case. The extraordinary service referred to Dutson's willingness to testify in the face of fear of retaliation from the gang (R. 132 [243-44]).

On cross-examination, Dutson acknowledged that the Trujillo shooting angered him and that he began plotting revenge with Chacon (R. 132 [244]). However, he insisted that all those involved planned the fire bombing together (R. 132 [245]). Dutson reiterated that his agreement with the State was based on his testifying truthfully (R. 132 [247]). In response to defense counsel's final question, to wit: would he tell a lie to avoid years in prison, Dutson responded, "Not sworn in court—that would block [me] from doing it" (R. 132 [248-49]).

On redirect examination, Dutson asserted that no one had suggested to him that he lie and that his attorney had advised him to tell the whole truth (R. 132 [249-50]). In response to the prosecutor's asking if he had lied under oath, Dutson responded: "No. I have no reason to lie. I am not up here to get Miquel. I don't hate Miguel. This is just some stuff that happened. We were all together. And I am just doing my part of the bargain" (R. 132 [250]). Dutson also expected that if he

lied under oath that he would wind up in prison for as much as five years to life (R. 132 [251]).

The Murder[3]

The information alleged that in the early morning of February 22, 1996, defendant, along with Carter and Lopes, went to the residence of Jimmy DeHerrera with the intent to kill the residents in retaliation for the Trujillo shooting one week earlier (Murder Pl. 5). There they found Joey Miera asleep on the floor, and through an open window defendant shot Miera twice in the head with a .20 gauge shotgun, killing him (Murder Pl. 5, 80). Information about defendant's involvement in the killing was obtained from Chacon and Dutson and Elizabeth Chacon, defendant's girlfriend (Murder Pl. 80-81). According to Elizabeth Chacon, defendant confessed killing Miera, though he later solicited her for an alibi (Murder Pl. 81). In a mirandized interview with police, defendant admitted that he had carried a gun to the crime scene, but denied using it (Murder Pl. 81). Defendant also admitted that he was one of the original founders of the King Mafia Disciples (Murder Pl. 80).

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[3] The facts bearing on the murder are drawn from the information and the trial court's findings and conclusions concerning the applicability of the "gang" enhancement (Murder Pl. 3-5, 79-84), and are not disputed on appeal.

SUMMARY OF ARGUMENT

POINT I – Evidence in support of defendant's aggravated arson conviction was overwhelming. Witnesses testified consistently and in detail that defendant actively participated in the planning, preparation and execution of the arson. Although the principal witnesses were, with one exception, defendant's accomplices who received leniency or immunity, their testimony is legally sufficient for a conviction. Defendant cites no authority supporting reversal based on accomplice testimony in circumstances remotely comparable to this case, and in any case, the jury received an instruction, drafted by defendant, cautioning them on the use of accomplice testimony. Contrary to defendant's claim, which identifies minor inconsistencies, the accomplices' testimony was uniformly consistent on all essential points and obviously credible to the jury.

POINT II – The prosecutor's remark in closing, referring to the significance of the case to the victims and danger posed to them by the offense was a reasonable response to defense counsel's earlier stating that the case was important to defendant and was a statement whose accuracy is not challenged. Even if the remark was improper it was not prejudicial. The remark was brief and not unduly emphasized, the trial court sustained defendant's objection, the jury was instructed both when the remark was made and when it retired to consider only the evidence in the case and

not argument of counsel, the court observed the jury and noted no adverse reaction, and evidence of guilt was overwhelming.

POINT III — The Court should decline to consider defendant's challenge to his plea of guilty to murder because the challenge is raised for the first time on appeal, defendant having failed to move to withdraw his guilty plea in the trial court. In any case, the claim that the trial court failed to strictly comply with the requirements of rule 11, Utah Rules of Evidence, by not informing him during the plea colloquy of the possibility of consecutive sentences is without merit. Defendant's plea affidavit stated the possibility of consecutive sentences, and the trial court fully and adequately incorporated the affidavit into the record

ARGUMENT

POINT I — THE EVIDENCE WAS MORE THAN SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION FOR AGGRAVATED ARSON.

Defendant principally claims that because the only evidence of defendant's involvement in the arson was alleged inconsistent testimony of accomplices, who were offered either leniency or immunity for their testimony, reasonable jurors should have entertained a reasonable doubt of defendant's guilt. Br. App. at 12. Defendant's claim fails because the jury plainly recognized that the evidence was consistent on all essential point, overwhelmingly inculpated defendant and was credible.

A. The Standard of Review.

In reviewing a challenge to the sufficiency of evidence in support of a conviction, this Court "will review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury." State v. Gibson, 908 P.2d 352, 355 (Utah App. 1995)(quoting State v. Johnson, 821 P.2d 1150, 1156 (Utah 1991)), cert. denied, 917 P.2d 556 (Utah 1996). "When reviewing the sufficiency of the evidence supporting a conviction, [the reviewing court] will reverse the conviction only when the evidence, viewed in the light most favorable to the verdict, `is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted.' State v. Quada, 918 P.2d 883, 887 (Utah App. 1996) (quoting State v. Marcum, 750 P.2d 599, 601 (Utah 1988)).

In State v. Goddard, the court "reemphasize[d] the limited role of an appellate court," in reviewing the sufficiency of the evidence in a criminal conviction. State v. Goddard, 871 P.2d 540, 543 (Utah 1994):

> In such cases, we afford great deference to the jury verdict. State v. James, 819 P.2d 781, 784-85 (Utah 1991). We will not sit as a second fact finder, nor will we determine the credibility of witnesses. That is the prerogative of the jury. "Where there is any evidence, including reasonable inferences that can be drawn from it, from which findings of all the elements of the crime can be made beyond a reasonable doubt, our inquiry is complete and we will sustain the verdict." State v. Gardner, 789 P.2d 273, 285 (Utah 1989), cert. denied, 494 U.S. 1090 (1990).

Id.

B. <u>The Evidence Amply Supports the Reasonableness of the Jury's Verdict of Defendant's Guilt</u>.

As recited in the information (Arson Pl. 7-8), Utah Code Ann. § 76-6-103(1)(b)(1995), provides, in pertinent part:

> (1) A person is guilty of aggravated arson if by means of fire or explosives he intentionally and unlawfully damages:
> . . . .
> (b) any structure or vehicle when any person not a participant in the offense is in the structure or vehicle.

In the early morning hours of February 18, 1996, the home of Mary Archuleta, located at 1259 West 500 South, was fire-bombed, resulting in fire in the front room and the adjacent porch of the house (R. 131 [70]; R. 132 [256, 290]). One of the occupant's recalled that the attack occurred at about 3:30 a.m. (R. 131 [104]).[4] Officer Payne concluded that the resulting fire at the Archuleta residence was an arson, and Fire Investigator Long concluded that the fire was intentionally set to burn the entire house down by the use of four incendiary devices constructed of gasoline-filled bottles with wicks thrown into various rooms of the house (R. 132 [256, 263, 281-82, 290]). One of incendiary devices was constructed of an "Ice 800" bottle, another of a quart-sized "Miller" beer bottle (R. 132 [256-62]). No usable or identifiable fingerprints were found on these two items (R. 132 [287-88]). The victims did not see the perpetrators (R. 131 [90,

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[4] Officer Payne, also, testified that at about 3:30 a.m. he was investigating an unrelated matter when an occupant in a car passing by informed him that a house "down the street" was on fire. Officer Payne followed the car to the Archuleta residence (R. 132 [255]).

100, 114]).

However, four witnesses for the State—Melissa Chacon, David Samora, Wanda Fox, and Gustave Dutson—collectively and consistently testified as to defendant's knowing and intentional involvement in the offense: (1) defendant, along with Lopes and Carter, were members of the King Mafia Disciples gang (R. 131 [116-119, 181]; R. 132 [212-13]), (2) the fire-bombing was in retaliation for the shooting of a fellow gang member, Davin Trujillo, by a rival gang (R. 131 [120-21, 123-26]; R. 132 [218-20]); (3) defendant was personally angered by the Trujillo shooting (R. 131 [178]; R. 132 [218]); (4) defendant, along with codefendants Lopes, Carter, and Dutson, were present at Fox's apartment in the early morning hours of February 18, 1996 (R. 131 [116-19, 123-32, 182-83]; R. 132 [221-22]); (5) defendant gathered privately with codefendants and actively participated in the planning of the retaliation and the construction of the incendiary devices used to effect the fire-bombing (R. 131 [123-26, 134-35, 175-77, 187]; R. 132 [223-26]); (6) the incendiary devices consisted of four quart-sized beer bottles, three of which "Miller" and one "Ice 800," filled with gasoline and stuffed with rag wicks (R. 131 [135-36, 187-89]); R. 132 [223-25, 228]);[5] (7) Fox and Samora supplied the gasoline (R. 131 [133,

[5] There was some slight inconsistency in the size of the beer bottles. Chacon testified on direct examination that all four bottles were quart-sized, but on cross examination thought one was regular ("small") sized (R. 131 [135, 153]). Fox thought

175, 184]; R. 132 [222]); (8) Dutson and Chacon supplied the gloves and masks (R. 131 [137-38]; R. 132 [220]); (9) each of the four conspirators left the apartment at about 3:00 a.m. holding one gasoline-filled bottle stuffed with a wick, and with gloves and a mask (R. 131 [137-39, 188-91]; R. 132 [228-31]); (10) all of the conspirators returned within one-half hour to one hour (R. 131 [139, 189]).

As a co-perpetrator of the arson itself, Dutson testified that defendant drove the party to the Archuleta home (R. 132 [230, 232]). After Dutson wrote gang symbols on a garage shed, the party spread out around the house, he to the front, the others to the rear (R. 132 [233-35]). Dutson lit the wick in his bottle and threw it through a front window, which started a fire (R. 132 [233-35]). He also heard breaking windows from the back of the house (R. 132 [235]). They all then ran to the car and drove back to Fox's house (R. 132 [236]). While in the car, Dutson heard each of the conspirator's, including defendant, assert that each of their fire bombs had gone into the house and start a fire (R. 132 [237]). Upon the gang's return, Chacon heard defendant say that he was on the side of the house, but was not sure whether or not his bottle had gone off (R. 131 [140]). Also in response to Chacon's inquiry about whether "they did it,"

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all the bottles were thirty-two ounces (R. 131 [188]. Dutson testified that they used quart-sized and forty ounce bottles (R. 132 [223]).

Lopes responded, "Yes, we did" (R. 131 [190]).

The sufficiency of the evidence is patent.

C. Defendant Fails to Cite Any Relevant Authority that the Testimony of Accomplices' is Eroded by Their Involvement in this Offense.

Defendant argues that because defendant's conviction is based on the testimony of witnesses involved in the offense, evidence of guilt is so speculative that the inference of guilt is unwarranted. Br. App. at 15. However, authority cited by defendant is either so distinguishable or downright unsupportive of defendant's position that it might reasonably be cited by the State in support of defendant's guilt. See United States v. Yoakam, 116 F.3d 1346, 1349-50 (10th Cir. 1997)(finding arson conviction the product of speculation and conjecture "because neither direct nor circumstantial evidence support[ed] the government's theory that [the defendant] was motivated to commit arson by pressure to enter an unfavorable business arrangement," and nothing other than the defendant's presence at the building, from which he exited only moments after other employees, linked him to the fire); United States v. Earl, 27 F.3d 423, 425-26 (9th Cir. 1994)(reversing drug conviction where an informant's contradictory testimony and some evidence linking the defendant to the premises failed to establish the defendant's constructive possession of a drug house); State v. Walker, 743 P.2d 191, 194-98 (Utah 1987)(reversing conviction for child sex abuse largely

founded on very young victims' "extraordinarily confused and contradictory testimony" and victims' mother testimony, which was significantly inconsistent with the rendition she gave to the police); State v. Smith, 706 P.2d 1052, 1055-57 (Utah 1985)(citing Utah Code Ann. § 77-17-7(1) (1995) in support of conviction based on testimony of two accomplices, one receiving leniency in plea bargain and the other receiving immunity, in spite of directly conflicting evidence of the defendant's participation in the offenses);[6] State v. McCullar, 674 P.2d 117, 118 (Utah 1993)(per curiam)(finding corroborated testimony of two accomplices who received immunity sufficient for conviction even though victims could not identify defendant as a perpetrator); State v. Pratt, 475 P.2d 1013, 1014 (Utah 1970)(reversing conviction under prior law where victim's testimony was materially contradicted by defendant and two other witness's testimony was "so self-contradictory, vague and uncertain that it must be deemed wholly insufficient to corroborate the testimony

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[6] Utah Code Ann. § 77-17-7 (1995) provides:

(1) A conviction may be had on the uncorroborated testimony of an accomplice.
(2) In the discretion of the court, an instruction to the jury may be given to the effect that such uncorroborated testimony should be viewed with caution, and such an instruction shall be given if the trial judge finds the testimony of the accomplice to be self contradictory, uncertain or improbable.

of [the accomplice]").[7]

Contrary to defendant's remarkable claim, the facts of this case do not exhibit inconsistencies remotely akin to those of Walker, Pratt, Earl, and Yoakam. Br. App. at 17. Rather, the consistent, undisputed facts recited above, casually overlooked by defendant, are clearly sufficient to support a conclusion that defendant acted as a principal in committing aggravated arson.

Refusing to acknowledge the overwhelming facts in support of guilt, defendant attacks the nature of the source of those facts, defendant's accomplices who received leniency in exchange for their testimony, and whose testimony, he alleges, is therefore inherently unreliable. Br. App. at 17-19. The State acknowledges that historically Utah regarded accomplice testimony as inherently suspect:

> "We recognize that an accomplice may be motivated

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[7] When Pratt was decided, the governing law concerning accomplice testimony was set out in Utah Code Ann. § 77-31-18 (1953). Pratt, 475 P.2d at 1014 n.2. Section 77-31-18 provided:

> A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof.

The Utah legislature repealed this section and enacted a new section 77-31-18 (Supp. 1979), which provided that "[a] conviction may be had on the uncorroborated testimony of an accomplice." This section was later recodified at Utah Code Ann. § 77-17-7 (1982). See State v. Schreuder, 726 P.2d 1215, 1218 (Utah 1986). Thus, because the standard for testing the weight of accomplice testimony has been reversed by statute since Pratt, that case is in nowise proper authority in this case.

> to falsify because of a desire to blame someone else in connection with the crime; or in the hope of obtaining leniency; or the very fact that he is involved in crime may tend to impair his credibility. These combine to justify looking upon his testimony with caution and refusing to permit a conviction to rest upon his word alone, as our statute provides."

State v. Ross, 573 P.2d 1288, 1290 (Utah 1978)(quoting State v. Sinclair, 15 Utah 2d 162, 389 P.2d 465, 467-468 (1964). In support of that caution, the court in Ross, relied on Utah Code Ann. § 77-31-18 (1953), see supra n.6, requiring that accomplice testimony in support of a conviction be corroborated. Id. ("This statute has been a part of the law of the state and territory of Utah since 1878, and is deeply imbedded in the wisdom of our system of law.").

However, Utah abandoned to a considerable extent its historical scepticism regarding uncorroborated accomplice testimony when it enacted Utah Code Ann. § 77-17-1 (1982), providing for conviction on the uncorroborated testimony of an accomplice. See supra n.6. In Smith, the court found the testimony of two accomplices, one receiving leniency in plea bargain and the other receiving blanket immunity, sufficient for conviction even though the defendant denied participating in the offenses. Smith, 706 P.2d at 1054-56. Notwithstanding conflicting evidence and defendant's denial that he had participated in the offenses, the court noted: "However, the jury is not obligated to believe that evidence. This court is

obliged to accept that version of the facts which the jury apparently believed and which supports the verdict." Id. at 1056. The court then noted that the version of the facts supporting the verdict showed that all the elements of the offense were present, and therefore, "the evidence was not so lacking and insubstantial that a reasonable person could not have determined beyond a reasonable doubt that the defendant committed the [offenses]." Id. at 1056-57.

A cursory review of the facts, set out above in support of defendant's participation in the aggravated arson, supports the same conclusion in this case. In the face of this evidence, defendant's assertions that the jury was "[invited] to presume that Flores must have been involved in the arson simply because he [might have been] a gang member," or that apart from any alleged gang affiliation "other indicators of Flores' motive or intent to commit arson are lacking," see Br. App. at 19, 20, are utterly unfounded. Additionally, defendant's concern about suspect accomplice testimony is overstated.

Samora was granted immunity, and Chacon and Dutson both received leniency through reduced and dismissed charges in exchange for their pleas to second degree felonies and their truthful testimony at trial (R. 131 [179, 156-59]; R. 132 [242-43]. Further, Chacon admitted that unless she cooperated with the State she would lose custody of her daughter (R. 131 [154-

55]). However, it does not necessarily follow that testimony is false because it is given in connection with an offer of immunity or through a plea bargain, especially where, as in this case, the jury found that the challenged witnesses were credible. In addition to the overall consistency of their testimony, both Chacon and Dutson emphatically and convincingly testified that their agreements required their truthful testimony, that they risked prison if they did lie under oath, and that they were, in fact, telling the truth (R. 131 [159-61]; R. 132 [248-50]).[8] Indeed, Dutson's credibility was likely enhanced by the fact that he risked retaliation from the King Mafia Disciples merely by testifying for the State (R. 132 [243-44]). Commensurate with the limited value of his testimony, Samora was only asked if he was testifying with immunity, which he acknowledged (R. 131 [179]). Finally, although she assisted in obtaining the gasoline, Fox was never charged with any offense, contrary to defendant's assertion, see Br. App. at 18, and never offered immunity for her testimony (R. 131 [199-201]). Her testimony alone, not subject to the traditional caution regarding accomplice testimony, plus the undisputed fact of the fire-

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[8] Chacon also made clear that her cooperation with the State would not compel her to lie in order "get her daughter back," because her daughter would be taken care of whether or not she went to prison (R. 131 [163]). Dutson also stated that he did not hate defendant and was not out to get defendant by testifying, but merely doing his part of the bargain (R. 132 [250]).

bombing itself, was sufficient to convict defendant as an accomplice.[9]

Moreover, as in Smith, 706 P.2d at 1055 n.3, and pursuant to section 77-17-7(2), the trial court gave an instruction, drafted by defendant (Arson Pl. 54), cautioning the jury on the proper regard of testimony of accomplices receiving leniency through plea agreements (Jury Instruction #9, Arson Pl. 66, attached at Addendum). The jury was additionally instructed that "[i]n judging the weight of the testimony and credibility of the witnesses you have a right to take into consideration their bias, their interest in the result of the suit, or any probable motive or lack thereof to testify fairly, if any is shown" (Jury Instruction #8, Arson Pl. 65). On these facts the jury's reliance on the challenged witness's testimony not unreasonable.

D. Alleged Inconsistencies in the Challenged Witness's Testimony are Immaterial in Themselves and Alongside the Mass of Consistent, Material Evidence, Corroborated by Undisputed Testimony of Official Investigators.

In further support of his claim that the testimony of Fox, Samora, Chacon, and Dutson is suspect, defendant claims that

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[9] Fox testified that (1) defendant was a King Mafia Disciple gang member (R. 131 [181); (2) that he was at her apartment with other gang members in the early morning of February 18, 1996 (R. 131 [182-83]); (3) gang members took the gasoline into her bathroom, from which they, including defendant, later emerged wearing masks and gloves, each holding 32-ounce bottles of gasoline with rags sticking out of them (R. 131 [187-89]); and (4) codefendant Lopes, upon returning with the other three conspirators, admitted that they "did it" (R. 131 190]). The jury was given an accomplice liability instruction (Arson Pl. 83).

their testimony is "rife with inconsistencies." Br. App. at 21-22. In the face of consistent, corroborative evidence, this claim is without merit.

Defendant's Presence at Fox's Apartment

Samora did not recall seeing defendant at Fox's apartment the night before the bombing, but also admitted that his memory of the evening before the fire-bombing was fuzzy, as was evidenced by his testimony generally (R. 131 [168-69, 174, 176]). However, defendant misrepresents Dutson's and Chacon's testimony, and with blatant disregard of the record suggests that Dutson, Chacon, and Fox suspiciously remembered defendant, but not the other conspirators. Br. App. at 22. In response to whether there had been other people at Fox's apartment who had left, Dutson said: "I think there had been. I was pretty drunk so I don't remember that night very good" (R. 132 [222]). In fact, Dutson was overly modest about his memory, since the record plainly shows that he testified at length and in detail about the events of that night. Most importantly, both he and Chacon consistently testified that defendant, along with Dutson, Lopes, and Carter, were at Fox's apartment to plan and prepare the arson and, in fact, committed the offense (R. 132 [221-233, 236-37]; R. 131 [116-19, 123-40). Regarding Fox, defendant admits that she recalled that defendant arrived at her apartment with the other three conspirators. Br. App. at 22. In sum, defendant's

assertion that "none of the accomplices had any memory of others present except, conveniently, Flores," see Br. App. at 22, is a clear misrepresentation of the record.

Purpose of gathering at Fox's Apartment

Defendant suggests that because Dutson said there was partying and drinking going on at Fox's apartment on the evening before the arson, and because Chacon and Fox indicated that there was no partying or drinking and that people had gathered to discuss the Trujillo shooting, the alleged contradiction "bears upon whether Flores was at the Fox apartment to be with friends on a Saturday night or whether he was actually part of the conspiracy to bomb the Archuleta home." Br. App. at 22-23. A cursory review of the facts set out above, Part IB, detailing defendant's active involvement in the planning and preparation of the offense, notwithstanding any partying or drinking that might have been going on, is ample response to defendant's argument.

Defendant's Presence at Crime Scene

Defendant argues that his presence at the crime scene should be considered doubtful because Dutson, who did not see defendant throw an incendiary device, assumed that defendant did so because he heard *back* windows breaking, while "Chacon . . . testified that Miguel said he threw a bomb in the *side* window." Br. App. at 23. The distinction is trivial given the hurried events of the arson, and especially in light of Dutson's testimony that all

of the conspirators said they had thrown their incendiary devices and Chacon's testimony that defendant admitted that he was at the site, but that his bottle might not have gone off (R. 132 [235-36]; R. 131 [140]).[10]

Chacon's and Fox's Disingenuous Claims of Non-Involvement

Defendant points out that Fox admitted she supplied the gasoline at Chacon's request, that Chacon admitted she (Chacon) was a Queen Mafia Disciple, and that both Chacon and Dutson acknowledged that Chacon had purchased the gloves and masks. However, because both Fox and Chacon claimed they merely watched television while the incendiary devices were prepared in the bathroom, from which the strong smell of gasoline emanated, their disingenuous claims of non-involvement suggest that they were shifting blame from themselves to defendant. Br. App. at 23-24. Insofar as Chacon's involvement is concerned, and to a much lesser extent Fox's, defendant's claim has some merit. It is not surprising that an accomplice (Chacon) or one privy to illegality (Fox) would downplay their involvement in a serious offense. However, Chacon plainly acknowledged her involvement in admitting

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[10] To the extent defendant attempts to suggest a conflict in the testimony about whether defendant was positioned at either a back or side window, defendant improperly draws on the record. Dutson never said he assumed defendant threw an incendiary device. Rather, he simply said that he heard windows breaking in the back of the house, from where he later saw his cohorts running (R. 132 [235-36]). Chacon testified that defendant reported that "he was on the side of the house, but he was not sure if his bottle went off or not" (R. 131 [140]). Thus, the witnesses did not contradict each other at all about which windows defendant might have broken.

she and Dutson purchased the gloves and masks to effect the retaliation, and Fox acknowledged her purchase of the gasoline (R. 131 [137, 184-87]). More importantly, any downplaying by Chacon and Fox of their involvement has little effect on defendant's obviously much greater involvement.

Discrepancies Concerning Construction of Incendiary Devices

Defendant correctly notes that Dutson said the beer bottles came from Fox's apartment, whereas Chacon said Samora went to get the bottles from outside the apartment, which Samora denied. Defendant also claims similar discrepancies in the source of the wicks, Dutson stating that ripped up towels were used, Chacon stating that Dutson asked Fox for an old T-shirt, and Fox stating she did not know where the rags came from. Br. App. at 24. The discrepancies concerning the source of the bottles pale alongside the fact that Chacon testified that quart-sized "Miller" bottles were used and Dutson said that quart-sized bottles, including an "Ice 800" were used, the same type of bottles which were recovered from the arson premises (R. 131 [153]; R. 132 [228, 256-62]). There is no significant discrepancy concerning the wicks because, contrary to defendant's bald assertion, Dutson testified that they were made of "towels *or something, rags*" (R. 132 [225]). Thus, Dutson's testimony does not contradict Chacon's, but rather indicates that he was not concerned with the source of the wicks.

Alleged Discrepancies Concerning Conspirators' Departure

Defendant claims discrepancies about whether the conspirators lingered before leaving Fox's apartment and whether they were wearing gloves and masks. Br. App. at 24-25. These alleged discrepancies are at most trivial. In fact, defendant acknowledges that Chacon stated the four conspirators had their masks and gloves in their pockets, and that Dutson stated that they hid their masks and gloves under their clothing (R. 131 [138]; R. 132 [230-31]). Moreover, contrary to defendant's assertion, Chacon's testimony suggests that the party shortly exited the apartment after trying on the masks and gloves, in basic conformity with Fox's testimony (R. 131 [137, 189]).

In sum, defendant has failed to show that the substantially consistent testimony of accomplices is so inherently improbable or sufficiently inconclusive that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.

POINT II — THE PROSECUTOR'S REMARK REFERRING TO THE VICTIMS, IN RESPONSE TO DEFENSE COUNSEL'S CLOSING ARGUMENT, WAS ARGUABLY PROPER, AND EVEN IF NOT, WAS AT MOST HARMLESS.

Defendant argues that the prosecutor's reference in closing argument to the circumstances of the victims was reversible error because it was irrelevant to elements of the charge and calculated to inflame the jury to vindicate the victims in the face of allegedly weak evidence. Defendant's lengthy argument

blows out of proportion an arguably proper, innocuous remark, and ignores the circumstances in which the remark was made, the propriety of the trial court's response, the plethora of curative instructions, and the compelling weight of evidence of defendant's guilt.

A. The Standard of Review.

"This court will reverse on the basis of prosecutorial misconduct only if defendant has shown that

> the actions or remarks of [prosecuting] counsel call to the attention of the jury a matter it would not be justified in considering in determining its verdict and, if so, under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result. . . .

State v. Cummins, 839 P.2d 848, 852 (Utah App. 1992)(quoting State v. Peters, 796 P.2d 708, 712 (Utah App. 1990), quoting State v. Gardner, 789 P.2d 273, 287 (Utah 1989), cert. denied, 494 U.S. 1090 (1990)). Further elaborating on the standard of review, this Court stated:

> In determining whether a given statement constitutes prosecutorial misconduct, the statement must be viewed in light of the totality of the evidence presented at trial. Further, because the trial court is in the best position to determine the impact of a statement upon the proceedings, its rulings on whether the prosecutor's conduct merits a mistrial will not be overturned absent an abuse of discretion.

Id. (citing Gardner, 789 P.2d at 287).

B. <u>The Factual Background</u>.

At the conclusion of his closing argument, defense counsel stated:

> But, in short, there have been many, many important trials that have taken place in this courtroom. But for Miguel Flores, this is most important, and I would submit for you this is the most important.

(R. 132 [319]).

In the course of his rebuttal closing, the prosecutor made the challenged remark, followed by defense counsel's objections and the trial court's ruling:

> MR. YBARRA [PROSECUTOR]: Now, Mr. Fratto [defense counsel] ends by saying, this is a most important trial. It's important to the defendant, of course. Many important cases have been tried in this court. But I want to remind you as well that there is the State in this case who also considers this an important case. And there are victims. There is Mary Archuleta, little Joseph Herrera and Candido Herrera and other people in this house that came close to burning to death.
>
> MR. FRATTO: I'll object. I'll object to that line of argument. That's improper. It tends to put to the jury that they are to do something other than use their prejudices. They are to be dispassionate.
>
> MR. YBARRA: Your Honor, he brought about the point about this being an important case.
>
> THE COURT: Let me indicate this: I am going to sustain the objection. The jury has been reminded that the statements of counsel are not evidence and they are not to consider them as evidence. I'll ask that you move on.
>
> MR. YBARRA: I simply make the point that this is an important case.

(R. 132 [325-26]).

After the close of argument, defense counsel moved for a mistrial on the ground that the prosecutor's remark suggested that the purpose of a guilty verdict was to "vindicate the victims or society in general because expressed it was a horrific crime," and served only to inflame the jury (R. 132 [328]).

The prosecutor responded by noting that it was defense counsel who first brought up the importance of the outcome of the case to defendant, that defense counsel's reference was an improper appeal to the passions of the jury, and that it would be improper to allow to go unrebutted defense counsel's suggestion that only defendant's interest was of importance in the case. The prosecutor further stated that the State never said it was important to obtain a verdict, but only that the case was important to the State and that other persons also had an important interest in the matter (R. 132 [328-29]).

The trial court denied the motion for a mistrial, noting that the jury had heard and would review again instructions stating that statements of counsel were not evidence and that they were not to base their verdict on passion or prejudice (R. 132 [329]). The court concluded by stating,

> I believe that as I was observing the jury when the statements were made, I didn't observe anything out of the ordinary in terms of expressions or that this meant something special to them when Mr. Ybarra made the statement. They were instructed to disregard it. And I believe that is a sufficient instruction for me

to give them. I don't think it was a statement that they will remember or attach any special significance to.

(R. 132 [329-30).

C. The Prosecutor's Remark was Arguably Proper, and Even if Improper, Harmless at Most.

Defendant argues that the prosecutor's remark improperly drew the juror's attention to the near deaths of the victims, information which was not at issue in determining guilt for aggravated arson. Br. App. at 27. However, in State v. Williams, 656 P.2d 450 (Utah 1982), an aggravated robbery case, the defendant also alleged prosecutorial misconduct based on the prosecutor's inviting the jury to consider what might have happened had the victim of the robbery been injured. Id. at 453. Although there was evidence of the defendant's possession of a knife seconds before the robbery, and evidently no necessity to refer to the victim's possible injuries, the supreme court held that the prosecutor's argument was not improper. Id. at 453-54. See also State v. Creviston, 646 P.2d 750, 754 (Utah 1982)(finding that prosecutor's reference to the "problem that we have with drugs in our community" reasonably called to the jury's attention the seriousness of the issues).

More particularly, the prosecutor's remark was reasonable rebuttal to defense counsel's focusing the jury on the paramount importance of the case to defendant without reference to the significance the victim's would also attach to it (R. 132 [325]).

In State v. Tillman, 750 P.2d 546 (Utah 1987), during closing argument, defense counsel emphasized that the defendant would probably be a 67-year-old man when he got out of prison following a life sentence, "broken and old and incapable of causing damage to anyone." 750 P.2d at 559-60. In response, the prosecutor questioned whether defendant would be a better person fifteen years hence when he got out of prison given the lack of remorse he had shown during the trial. Id. at 560. Defendant then contended on appeal that the prosecutor's comments "were misleading and had the potential of improperly influencing its decision on the death penalty." Id.

In rejecting this argument, the Utah Supreme Court found it significant that "it was defense counsel who first commented that in Utah, parole is a possibility under a life sentence." Id. The court held that while the prosecutor's remarks "were arguably improper and prejudicial . . . , his comments, when placed within the context of his and defense counsel's entire arguments, fall within the ambit of permitted conduct." Id. See also Creviston, 646 P.2d at 754 (no misconduct in prosecutor's comments on the significance of the defendant's presence at drug sale, made in direct response to a theory of the defense); State v. Valdez, 30 Utah 2d 54, 513 P.2d 422, 425 (Utah 1993)(no prosecutorial misconduct where the prosecutor's rebuttal was in direct reply to theory advanced by defense in its final argument and remarks were within the range of reasonable inferences to be drawn from the evidence); State v. Bowman, 945 P.2d 153, 157 (Utah App.

1997)(finding no misconduct in arguing in rebuttal that the defendant had the option to call missing witness where the defendant opened the door by arguing in closing that he should be acquitted based on the State's failure to call the witness).

In this case, the prosecutor's remark was plainly triggered by defense counsel's statement about the importance of the case to defendant and is barely more than a statement that there were victims involved. Moreover, there can be no challenge to the accuracy of the prosecutor's assertion that the victims came close to burning to death. The fire investigator testified that if all the incendiary devices had gone off, the entire structure would have been involved and probably collapsed before the fire department arrived, and based on the placement of those devices, Mr. Herrera's chances of survival were small (R. 132 [291-92]).

Defendant's principal challenge to the prosecutor's remark is that it served to inflame the jury into basing its verdict on the vindication of the victims. Br. App. at 27. In aid of this challenge, defendant grossly mischaracterizes the quality of the remark, arguing that it conjured up an "horrific image of an event which never happened." Br. App. 30. In support, defendant cites authority the facts of which are substantially distinguishable from those in this case.[11] In fact, the

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[11] Defendant cites, see Br. App. at 29, the following cases: State v. Carter, 888 P.2d 629, 650-652 (Utah 1995)(substantial victim impact evidence found inadmissible under capital sentencing statute); State v. Dibello, 780 P.2d 1221, 1229-30

prosecutor's remark is a brief reference to a mere potential impact, an impact supported by the evidence.

Even if the prosecutor's remark was improper, it was not harmful. See State v. Taylor, 884 P.2d 1293, 1298 (Utah App. 1994)("Only if the improper statements are deemed to be harmful will they require reversal.")(citation omitted).

First, the prosecutor only briefly commented on the victims' circumstances, and in accord with the trial court's ruling, moved on and concluded his argument (R. 132 [325-26]). Cf. Gardner, 789 P.2d 273, 287 (Utah 1989) (prosecutor's calling the defendant by the wrong name was not prejudicial where "[t]he reference, taken in context, was inadvertent, was immediately corrected, and did not interrupt the flow of the proceedings or focus the jury's attention on an improper basis for the verdict"); State v. White, 880 P.2d 18, 23 (Utah App. 1994) (finding persuasive, in harmless error analysis, that prosecutor did not "unduly emphasize or otherwise misuse" exhibit of bloody pants).

Second, the trial court sustained defendant's objection,

(Utah 1989)(error to admit six-minute videotape focusing on victim's bloody, beaten body and gaping stab wounds under rule 403, Utah Rules of Evidence); State v. Maurer, 770 P.2d 981, 983 (Utah 1989)(characterizing as "repulsive," "vulgar," and "profane," defendant's letter to murdered victim's father, written for the purpose of taunting and inflicting guilt on the victim's father); State v. Bishop, 753 P.2d 439, 476 (Utah 1988)(improper admission of gruesome photos depicting gashes and holes in victim's skull); cf. State v. White, 880 P.2d 18, 23 (Utah App. 1994) (distinguishing blood-stained pants that were merely "not particularly pleasant" from gruesome photographs, one of three types of presumptively prejudicial evidence shifting the burden of admissibility identified in State v. Lafferty, 749 P.2d 1239, 1256 (Utah 1988), cert. denied, 504 U.S. 911 (1992)).

immediately instructed the jury that statements of counsel were not evidence, and instructed the prosecutor to move on, thus minimizing any prejudicial effect (R. 132 [326]). Additionally, the jury was instructed in writing that (1) "[t]he law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" (Jury Instruction 3, Arson Pl. 58); and (2) "[s]tatements and argument of counsel are not evidence" and "[the jury is] to consider only the evidence in the case" (Jury Instruction 4, Arson Pl. 60). Notwithstanding defendant's argument, Utah appellate courts have repeatedly acknowledged and relied upon the efficacy of curative and limiting instructions in cases of alleged misconduct.[12]

Third, the trial court observed the jury when the statements were made and "didn't observe anything out of the ordinary in terms of expressions or that this meant something special to them

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[12] See State v. Thompson, 776 P.2d 48, 50 (Utah 1989) (if the jury was inclined to be influenced by the State's improper remarks, "the jury instructions that were given cured any potential error"); Tillman, 750 P.2d at 561 (no prejudice where prosecutor's rebuttal in closing was merely a response issue raised by defense counsel and jury admonished to consider only evidence introduced at trial); Creviston, 646 P.2d at 754 (finding no error where jury cautioned to consider only the evidence and to disregard utterances not having a basis in the evidence); State v. Andreason, 718 P.2d 400, 402 (Utah 1986) (plainly implying that prosecutor's lengthy and improper comments on matters outside evidence would have been cured if the court had granted the defendant's objection and admonished the jury to disregard the comments); State v. Boyatt, 854 P.2d 550, 550 (Utah App. 1993)(prosecutor's incomplete statement of law not harmful where trial court gave a complete instruction on the law); State v. Humphrey, 793 P.2d 918, 925 (Utah App. 1990)(finding "the trial court's immediate admonition that the statement be stricken and that no further reference be made to the statement, rendered harmless the otherwise improper testimony").

when Mr. Ybarra made the statement" (R. 132 [330]). See State v. Williams, 773 P.2d 1368, 1373 (Utah 1989)(finding no prejudice in witness's reference to the defendant's parole status where jury instructed to disregard the evidence, curative instructions given, and "the trial court felt that the statement was lost on the jury and noted that it observed no visible reaction of the jurors to the testimony").

Fourth, as set out at length in Part IB, above, the evidence of defendant's guilt was overwhelming and consistent with respect to all the significant details of the offense, not only with respect to the accomplices' testimony, but also as that testimony was confirmed by investigator's observations of the crime scene.[13] It took the jury only 50 minutes to decide this case (R. 132 [330, 332]), and it's obvious that the decision was not based on the prosecutor's remark.

Finally, defendant argues that, on policy grounds, prosecutorial misconduct should effectively be treated as per se reversible error, thereby nullifying harmless error analysis. App. Br. at 37. In State v. Tenney, 913 P.2d 750 (Utah App.

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[13] See Carter, 888 P.2d at 653 (no prejudice where improper victim impact testimony was relatively mild and evidence of guilt overwhelming); State v. Young, 853 P.2d 327, 349 (Utah 1993) ("When there is strong proof of guilt, the conduct or remark of a prosecutor is not presumed prejudicial."); State v. Span, 819 P.2d 329, 335 (Utah 1991)(prejudice "negligible" where jury would likely have pondered issues related to testimony improperly elicited and trial judge instructed the jury to disregard the objectionable material); State v. Wright, 893 P.2d 1113, 1119 (Utah App. 1995)(no prejudice, assuming arguendo error in prosecutor's remarks, in light of all the evidence).

1996), this Court rejected a per se prejudice claim of prosecutorial misconduct, noting that "[w]hile other jurisdictions have found that egregious misconduct by a prosecutor can "so color[] the proceedings that [defendant] was denied a fair trial . . ., Utah requires a more concrete showing of prejudice compared to the strength of the evidence against defendant." Id. at 755 (citation omitted).

In sum, the prosecutor's reference to the importance of the case to the victims with a brief reference to their circumstances was arguably a proper response to defense counsel's informing the jury that the case was important to defendant. But if the remark was improper, it was not prejudicial.

POINT III – THIS COURT SHOULD DECLINE TO CONSIDER DEFENDANT'S CHALLENGE TO THE PLEA-TAKING BECAUSE HE DID NOT MOVE TO WITHDRAW HIS PLEA AND FAILS TO CLAIM PLAIN ERROR ON APPEAL. IN ANY CASE, BECAUSE THE COURT FULLY AND PROPERLY INCORPORATED THE PLEA AFFIDAVIT INTO THE PROCEEDINGS, THE REQUIREMENTS OF RULE 11 WERE STRICTLY COMPLIED WITH.

Defendant claims that because the trial court failed to inform him during the plea colloquy of the possibility that consecutive sentences might be imposed, the court failed to strictly comply with the requirements of rule 11, Utah Rules of Evidence. App. Br. at 38.[14] The claim is totally meritless and

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[14] Defendant also appears to suggest that the trial court's alleged failure to inform him of the possibility of consecutive sentences was further compounded by his having entered his plea with the understanding that he would receive concurrent sentences. Br. App. at 38. The suggestion is misleading and unfounded. Defendant acknowledges that, in accord with the plea

should not even be considered in the circumstances of the case.

A. Because Defendant Failed to First Move to Withdraw His Guilty Plea in the Trial Court, His Claim Should Not be Reviewed on the Merits.

Defendant did not first move to withdraw his plea before appealing the manner in which his plea was taken. "Defendant must first move to set aside the plea; he or she can not challenge the plea for the first time on appeal from the conviction." Summers v. Cook, 759 P.2d 341, 343 (Utah App. 1988). Moreover, defendant has failed to allege that the trial court committed plain error or that he suffered manifest injustice in the manner in which the court accepted his guilty plea to murder. See State v. Pharris, 798 P.2d 772, 774 (Utah

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affidavit (Arson Pl. 59-66, attached at Addendum B) the prosecutor fulfilled the State's promise to recommend concurrent sentencing (R. 101 [3]). Br. App. at 41 n.7. Further, the plea affidavit states that defendant understood that the court was not bound by any sentencing recommendation (Arson Pl. at 63).

Also, the State notes that it principally relies on the adequacy of the plea affidavit and the manner in which the trial court incorporated the affidavit into the record in refuting defendant's claim. However, the record also makes clear that defendant had actual notice of the possibility of consecutive sentences not only from the trial court, but from his counsel as well. During the plea colloquy, the trial court confirmed with defendant, his counsel, and the prosecutor that the plea agreement included the imposition of the group criminal activities enhancement (popularly known as the "gang" enhancement) and the gun enhancement, ***consecutive*** with sentences imposed for defendant's other convictions (R. 101 [2-4, 13]). Moreover, at sentencing, defense counsel, let slip that defendant knew of consecutive sentencing and acknowledged that defendant pleaded guilty "because of representations that the State would not recommend ***consecutive*** sentencing" (R. 136 [5])(emphasis added). Since the trial court informed defendant, and defendant acknowledged, that any recommendations were not binding on the court's sentencing discretion (R. 101 [14]), it is plain in these circumstances that defendant, a young career criminal, knew of the possibility of consecutive sentencing.

App. 1990)(addressing voluntariness of guilty plea for the first time on appeal under plain error doctrine where trial court found to have committed multiple errors in accepting plea).

The record plainly and readily shows that the trial court strictly complied with the requirements of rule 11. Therefore, this Court should decline to review defendant's claim on appeal.

B. Even Considering Defendant's Claim, it is Plain that the Trial Court Strictly Complied with the Requirements of Rule 11 by Incorporating the Plea Affidavit into the Record.

Rule 11(e)(4) provides: "The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found . . . the defendant understands the nature and elements of the offense to which the plea is entered. . . ." Strict compliance with rule 11 is required. State v. Hoff, 814 P.2d 1119, 1122 (Utah 1991). A trial court must "personally establish that the defendant's guilty plea is truly knowing and voluntary and establish *on the record* that the defendant knowingly waived his or her constitutional rights and understood the elements of the crime." State v. Abeyta, 852 P.2d 993, 995 (Utah 1993) (per curiam). In addition, the trial court must determine that the defendant "`possesses an understanding of the law in relation to the facts.'" State v. Breckenridge, 688 P.2d 440, 444 (Utah 1983)(citation omitted).

However, the trial court is not "rigidly tied to the colloquy with the defendant [or] relegated to rote recitation of

the rule 11 elements when entertaining a plea." Abeyta, 852 P.2d at 996 (citing State v. Maguire, 830 P.2d 216, 218 n.2 (Utah 1991) (per curiam)).

In Maguire, the supreme court sought to "make clear that strict compliance can be accomplished by multiple means so long as no requirement of the rule is omitted and so long as the record reflects that the requirement has been fulfilled." Id. 830 P.2d at 218. In furtherance of that objective, the court stated:

> When plea affidavits are properly incorporated in the record (as when the trial judge ascertains in the plea colloquy that the defendant has read, has understood, and acknowledges all the information contained therein), they may properly form a part of the basis for finding rule 11 compliance.

Id. at 217. Quoting with approval State v. Smith, 812 P.2d 470, 477 (Utah App. 1991)(Russon, J., concurring), cert. denied, 836 P.2d 1383 (Utah 1992), the court further stated:

> It is critical, however, that strict Rule 11 compliance be demonstrated on the record at the time the ... plea is entered. Therefore, if an affidavit is used to aid Rule 11 compliance, it must be addressed during the plea hearing. The trial court must conduct an inquiry to establish that the defendant understands the affidavit and voluntarily signed it. . . . Any omissions or ambiguities in the affidavit must be clarified during the plea hearing, as must any uncertainties raised in the course of the plea colloquy. Then the affidavit itself, signed by the required parties, can be incorporated into the record. The efficiency-promoting function of the affidavit is thereby served, in that the court need not repeat, verbatim, Rule 11 inquiries that are clearly posed and answered in the affidavit, unless Rule 11 by its terms specifically requires such repetition.

Id. at 218.[15]

Overlooking Maguire, defendant particularly relies on State v. Dastrup, 818 P.2d 594 (Utah App. 1991), cert. denied, 843 P.2d 516 (Utah 1992). Br. App. at 40, 43.[16] However, in clarifying the appropriate role of a properly incorporated plea affidavit and rejecting the view that the court's "strict compliance test requires a time-consuming, mechanical oral recitation of each element mentioned in rule 11," the supreme court specifically repudiated this Court's "rigid view" of "the record" adopted in Dastrup, which "apparently construed 'the record' to mean only the transcript of the oral plea colloquy, thereby concluding that 'the trial court must base its findings solely on the colloquy, without considering any statements made in the affidavit'". Maguire, 830 P.2d at 218 n.2.

In this case, as defendant concedes, see Br. App. at 43, the plea affidavit stated that consecutive sentences might be imposed if defendant was awaiting sentencing on another offense on which

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[15] See also State v. Thurman, 911 P.2d 371, 374 (Utah 1996) (looking at defendant's plea affidavit and the plea colloquy between defendant and the trial judge); State v. Mills, 898 P.2d 819, 823 (Utah App. 1995)(quoting Maguire with approval in noting that "when plea affidavits are properly incorporated in the record . . . they may properly form a part of the basis for finding rule 11 compliance"); State v. Price, 837 P.2d 578, 581 (Utah App. 1992)(finding rule 11 compliance based on proper incorporation of plea affidavit).

[16] Similarly relied on by defendant and of dubious authority are State v. Pharris, 777 P.2d 772, 777 n.13 (Utah App. 1990)(pre-Maguire case interpreting Gibbons to preclude use of affidavit in satisfying requirements of rule 11), and State v. Vasilicopulos, 756 P.2d 92, 95 (Utah App.)(affidavit stating that the defendant would be subject to consecutive sentences only under certain conditions inadequately reflected rule 11 requirements), cert. denied, 765 P.2d 1278 (Utah 1988).

he had been convicted (Arson Pl. at 62). Although the trial court engaged defendant in a discussion of rights he was waiving by pleading guilty to murder, the court neglected to specifically mention that consecutive sentences could be imposed (R. 101 [9-14]). However, the court scrupulously followed the procedure set out in Smith, incorporating the plea affidavit into the record by first ascertaining from defense counsel that (1) the affidavit had been prepared, (2) counsel had reviewed the affidavit with defendant, (3) counsel believed defendant understood the affidavit, (4) counsel had gone over the affidavit "word by word," and (5) counsel believed defendant understood his constitutional rights (R. 101 [4-5]).[17] Immediately thereafter, through colloquy with and positive affirmation from defendant, the trial court ascertained that (1) defendant was aware of plea affidavit his counsel had prepared and had enough time to go over it, (2) counsel had read the affidavit to defendant, (3) defendant had an opportunity to ask questions about anything he did not understand, (4) defendant was fully aware of the contents of the affidavit as a result of reviewing it with his counsel, (5) defendant was not under the influence of drugs, alcohol or anything that would impair his ability to think clearly, and (6) by signing the affidavit defendant understood he would be admitting that its contents were accurate and correct (R. 101 [5-7]).

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[17] The transcript of the relevant plea colloquy is attached at Addendum C.

When the court asked defendant if he had made a voluntary decision to sign the affidavit, defendant responded affirmatively, but then said, "I don't want to do this" (R. 101 [8]). The trial court allowed defendant a recess in which to discuss his concerns with his counsel. Following the recess, the court again elicited from defendant positive responses establishing that defendant had an opportunity to speak with his counsel and have counsel answer his questions, and that defendant had signed the affidavit freely and voluntarily. Defense counsel also stated that he was convinced defendant was acting knowingly and voluntarily (R. 101 [8-9]).

"[I]n cases where the judge does sufficiently question the defendant about his affidavit, the affidavit should be permitted to cover any gaps in the colloquy." Dastrup, 818 P.2d at 597 (Russon, J., concurring). Because the court so thoroughly questioned defendant about his affidavit in this case, any omission in the colloquy does not negate that rule 11 requirements were strictly complied with.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that defendant's convictions be affirmed.

ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

Because this case presents no complex or novel questions, the State does not request that it be set for oral argument or that a published opinion issue.

RESPECTFULLY SUBMITTED this 11th day of March, 1998.

JAN GRAHAM
Attorney General

KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF HAND-DELIVERY

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were hand delivered to Catherine L. Begic, Salt Lake Legal Defender Assoc., attorneys for appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 11th day of March, 1998.

ADDENDA

ADDENDUM A

UTAH CODE
ANNOTATED

76-6-103. Aggravated arson.

(1) A person is guilty of aggravated arson if by means of fire or explosives he intentionally and unlawfully damages:

(a) a habitable structure; or

(b) any structure or vehicle when any person not a participant in the offense is in the structure or vehicle.

(2) Aggravated arson is a felony of the first degree.

77-17-7. Conviction on testimony of accomplice — Instruction to jury.

(1) A conviction may be had on the uncorroborated testimony of an accomplice.

(2) In the discretion of the court, an instruction to the jury may be given to the effect that such uncorroborated testimony should be viewed with caution, and such an instruction shall be given if the trial judge finds the testimony of the accomplice to be self contradictory, uncertain or improbable.

UTAH RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas.

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(2) the plea is voluntarily made;

(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(4) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(8) the defendant has been advised that the right of appeal is limited.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g) (1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved by the court.

(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(h) (1) The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(i) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(j) When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code Ann. § 77-16a-103.

(Amended effective May 1, 1993; January 1, 1996.)

ADDENDUM B

In The Third Judicial District Court Of Salt Lake County

State of Utah

December 3, 1996

THE STATE OF UTAH, Plaintiff	:	STATEMENT OF DEFENDANT CERTIFICATE OF COUNSEL AND ORDER
vs	:	
Miguel A. Flores, Defendant	:	Criminal No. 961900905 FS

COMES NOW, Miguel A. Flores, the Defendant in this case and hereby acknowledges and certifies the following:

I have entered a plea of (guilty)(no contest) to the following crime(s):

	CRIME & STATUTORY PROVISION	DEGREE	PUNISHMENT Min/Max and/or Minimum Mandatory
A.	CRIMINAL HOMICIDE - Murder	1st	5 - Life &/or
	76-5-201		$10,000 fine plus 85% surcharge.
	ENHANCEMENTS		*
B.	A) GUN ENHANCEMENT		1 yr. CONSECUTIVE
	B) GANG ENHANCEMENT		enhanced minimum of 9 years
C.			
D.			

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I have received a copy of the (charge)/(information) against me, I have read it, and I understand the nature and elements of the offense(s) for which I am pleading (guilty)/(no contest).

The elements of the crime(s) of which I am charged are as follows: The defendant acting under circumstances evidencing a depraved indifference to human life engaged in conduct which created a grave risk of death to another and thereby caused the death of another: to wit: Joseph Miera.

My conduct, and the conduct of other persons for which I am criminally liable, that constitutes the elements of the crime(s) charged are as follows: I, Miguel Flores, fired shots into the home occupied by Joseph Miera thereby causing his death. These acts occurred on 22 February 1996, at 918 South Navajo Street, S.L.C., Salt Lake County, Utah.

I am entering this/these plea(s) voluntarily and with knowledge and understanding of the following facts:

1. I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the Court at no cost to me. I recognize that a condition of my sentence may be to require me to pay an amount, as determined by the Court, to recoup the cost of counsel if so appointed for me.

2. I (have not)/(have) waived my right to counsel. If I have waived my right to counsel, I have done so knowingly,

intelligently and voluntarily for the following reasons:

_____

_____

_____

3. If I have waived my right to counsel, I have read this statement and understand the nature and elements of the charges my rights in this and other proceedings and the consequences of my plea of guilty.

4. If I have not waived my right to counsel, my attorney is Kevin J. Kuramoto, and I have had an opportunity to discuss this statement, my rights and the consequences of my guilty plea with my attorney.

5. I know that I have a right to a trial by jury.

6. I know that if I wish to have a trial I have the right to confront and cross-examine witnesses against me or to have them cross-examined by my attorney. I also know that I have the right to compel my witness(s) by subpoena at State expense to testify in court in my behalf.

7. I know that I have a right to testify in my own behalf but if I choose not to do so I cannot be compelled to testify or give evidence against myself and no adverse inferences will be drawn against me if I do not testify.

8. I know that if I wish to contest the charge against me I need only plead "not guilty" and the matter will be set for trial. At the trial the State of Utah will have the burden of proving each element of the charge beyond a reasonable doubt. If

the trial is before a jury the verdict must be unanimous.

9. I know that under the Constitution of Utah that if I were tried and convicted by a jury or by the Judge that I would have the right to appeal my conviction and sentence to the Utah Court of Appeals or, where allowed, the Utah Supreme Court, and that if I could not afford to pay the costs for such appeal, those costs would be paid by the State.

10. I know the maximum sentence that may be imposed for each offense to which I plead (guilty)(no contest). I know that by pleading (guilty)(no contest) to an offense to which I plead (guilty)(no contest). I know that by pleading (guilty)(no contest) to an offense that carries a minimum mandatory sentence that I will be subjecting myself to serving a minimum mandatory sentence for that offense. I know that the sentence may be consecutive and may be for a prison term, fine or both. I know that in addition to a fine, a (twenty-five [25%])(eighty-five [85%]) surcharge, required by Utah Code Annotated 63-63a-4, will be imposed. I also know that I may be ordered by the Court to make restitution to any victim(s) of my crimes.

11. I know that imprisonment may be for consecutive periods, or the fine for additional amount, if my plea is to more than one charge. I also know that if I am on probation, parole, or awaiting sentencing on another offense of which I have been convicted or to which I have pled guilty, my plea in the present action may result in consecutive sentences being impcsed upon me.

12. I know and understand that by pleading (guilty)(no contest) I am waiving my statutory and constitutional rights set out in the preceding paragraphs. I also know that by entering such plea(s) I am admitting and do so admit that I have committed the conduct alleged and I am guilty of the crime(s) for which my plea(s) is/are entered.

13. My plea(s) of (guilty)(no contest) (is)(is not) the result of a plea bargain between myself and the prosecuting attorney. The promises, duties and provisions of this plea bargain, if any, are fully contained in the Plea Agreement attached to this affidavit.

14. I know and understand that if I desire to withdraw my plea(s) of (guilty)(no contest), I must do so by filing a motion within thirty(30) days after entry of my plea.

15. I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing made or sought by either defense counsel or the prosecuting attorney are not binding on the Judge. I also know that any options they express to me as to what they believe the Court may do are also not binding on the Court.

16. No threats, coercion, or unlawful influence of any kind have been made to induce me to plead guilty, and no promises except those contained herein and in the attached plea agreement, have been made to me.

17. I have read this statement or I have had it read to me by my attorney, and I understand its provisions. I know that I am free to change or delete anything contained in this statement. I do not wish to make any changes because all of the statements are correct.

18. I am satisfied with the advice and assistance of my attorney.

19. I am 20 years of age; I have attended school through the 12th grade and I can read and understand the English language or an interpreter has been provided to me. I was not under the influence of any drugs, medication or intoxicants which would impair my judgement when the decision was made to enter the plea(s). I am not presently under the influence of any drug, medication or intoxicants which impair my judgement.

20. I believe myself to be of sound and discerning mind, mentally capable of understanding the proceedings and the consequences of my plea and free of any mental disease, defect or impairment that would prevent me from knowingly, intelligently and voluntarily entering my plea.

DATED this 3 day of Dec, 1996.

Vivian Flood
DEFENDANT

Plea Agreement: State will recommend concurrent sentencing with prior Aggravated Arson conviction. State will not file any charges regarding a subsequent alleged Conspiracy to Commit Murder regarding Elizabeth Chacon unless an overt act occurs which threatens the life of Elizabeth Chacon.

CERTIFICATE OF ATTORNEY

I certify that I am the attorney for Miguel A. Flores, the Defendant above, and that I now he/she has read the statement or that I have read it to him/her and I have discussed it with him/her and believe that he/she fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.

Kevin J. Kennedy # 1867
ATTORNEY FOR DEFENDANT/BAR #

CERTIFICATE OF PROSECUTING ATTORNEY

I certify that I am the attorney for the State of Utah in the case against Miguel A. Flores, Defendant. I have reviewed this statement of the Defendant and find that of the Defendant's criminal conduct which constitutes the offense are true and correct. No improper inducements, threats or coercion to encourage a plea have been offered Defendant. The plea negotiations are fully contained in the statement and in the attached plea agreement or as supplemented on record before the

Court. There is reasonable cause to believe that the evidence would support the conviction of Defendant for the offense(s) for which the plea(s) is/are entered and the acceptance of the plea(s) would serve the public interest.

Roderick Young 4184
PROSECUTING ATTORNEY/BAR #

ORDER

Based on the facts set forth in the foregoing statement and the certification of the defendant and counsel, the Court witnesses the signatures and finds the defendant's plea(s) of (guilty)(no contest)is freely and voluntarily made and it is so ordered that the Defendant's plea(s) of (guilty)(no contest) to the charge(s) set forth in the statement be accepted and entered.

DONE IN COURT this 3 day of December, 1996.

Sandra Peuler
DISTRICT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

ADDENDUM C

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

-oOo-

STATE OF UTAH, Plaintiff, vs. MIGUEL FLORES, Defendant.	Case No. 961900905 FS CHANGE OF PLEA (Videotape Proceedings)

-oOo-

BE IT REMEMBERED that on the 3rd day of December, 1996, commencing at the hour of 1:36 p.m., the above-entitled matter came on for hearing before the HONORABLE SANDRA PEULER, sitting as Judge in the above-named Court for the purpose of this cause, and that the following videotape proceedings were had.

-oOo-

A P P E A R A N C E S

For the State:
RODWICKE YBARRA
Deputy Salt Lake District Attorney
231 East 400 South, #300
Salt Lake City, Utah 84111

For the Defendant:
KEVIN J. KURUMADA
Attorney at Law
431 South 300 East, #101
Salt Lake City, Utah 84111

ALAN P. SMITH, CSR
385 BRAHMA DRIVE (801) 266-0320
SALT LAKE CITY, UTAH 84107

PROCEEDINGS

THE COURT: We're on the record.

The matter before the Court today is State of Utah vs. Miguel Flores. The case number is 961900905. I'll indicate for the record that Mr. Flores is present with counsel, Mr. Kurumada. The State is also represented by Mr. Ybarra.

This matter is set for trial tomorrow and I'm advised that there's been an agreement reached and perhaps I could have counsel tell me what that is.

MR. KURUMADA: That's correct, your Honor.

MR. YBARRA: Yes, your Honor. The defendant now, of course, stands charged in this case with the offense of murder, a first-degree felony, with both gang and gun enhancements. He's also been previously convicted of the crime of aggravated arson before your Honor, first-degree felony with gang enhance--well, I guess it does not have a gang enhancement.

In addition, your Honor, there is an under--an outstanding investigation that indicates that Mr. Flores may be involved in a conspiracy or solicitation to commit murder.

The State, after we have researched the issue of

the potential impact on the Board of Pardons with regard to consecutive and concurrent sentences on life sentences being, as we understand it, that doesn't have a whole lot of impact, inasmuch as the Board of Pardons has authority to keep the person in prison as long as they think appropriate on any one of those life sentences, under all of those circumstances, we have felt it appropriate to offer that if the defendant changes his plea to guilty as charged in this case, that is to the criminal homicide, murder, with both gang and gun enhancements, resulting in an enhanced minimum of nine years to life, with a consecutive one year for the gun enhancement, the State would move the Court at the time of sentencing, to sentence the defendant concurrently with the previously adjudged aggravated arson, and that we would agree not to file charges on the outstanding investigation of solicitation to commit murder, as long as no overt act occurred in that case, that in any way endangered the purported victim, Elizabeth Chacon.

THE COURT: Let me just ask, Mr. Ybarra, have you consulted with the family members of the victim about this proposal?

MR. YBARRA: I have, your Honor. They're present in the courtroom and I have spoken with them and explained to them what we were going to propose and I believe that they're in agreement with it, they're nodding

their heads, your Honor. Yes.

THE COURT: All right. Is that correct? All right. And I assume then that you've carefully weighed any input or concerns that they expressed to you and that you fully explained your reasons to them for this proposal?

MR. YBARRA: I have, your Honor.

THE COURT: All right. Thank you. I appreciate that.

Mr. Kurumada, does that accurately set forth the plea agreement that you've reached in this case?

MR. KURUMADA: It does, your Honor.

THE COURT: All right. Has the statement of defendant been prepared?

MR. KURUMADA: It has.

THE COURT: Have you had time to go over that with your client?

MR. KURUMADA: Yes, I have.

THE COURT: Do you believe at this time that he understands the contents of that agreement?

MR. KURUMADA: I do.

THE COURT: And have you had enough time to go over all of this with him so that you believe he understands the proceedings this afternoon?

MR. KURUMADA: Yes. We've gone over it word by word.

THE COURT: And you also believe he understands his Constitutional rights?

MR. KURUMADA: I do.

THE COURT: All right. Let me ask the defendant some questions.

Is your correct name Miguel Flores?

MR. FLORES: Yes.

THE COURT: Do you have a middle name, Mr. Flores?

MR. FLORES: Yes. Angel.

THE COURT: What is your middle name?

MR. FLORES: Angel.

THE COURT: And that's spelled A-n-g-e-l?

You need to say yes or no, please.

MR. FLORES: Yes.

THE COURT: Thank you.

What's your date of birth, sir?

MR. FLORES: 8-18-76.

THE COURT: All right. Mr. Flores, Mr. Kurumada tells me that you've had an opportunity to go over the statement that he's prepared, that's the document that's in front of you. Have you had enough time to go over that with him?

Do you know which document I'm referring to, Mr.

Flores?

MR. FLORES: Yeah.

THE COURT: Yes or no?

MR. FLORES: Yes.

THE COURT: All right. Did you read that document or did Mr. Kurumada read it to you?

MR. FLORES: Yeah.

THE COURT: Which was it? Did you read it or did he read it to you?

MR. FLORES: He read it to me.

THE COURT: All right. When he read it to you, did you also have an opportunity to ask him questions about it, if there was anything in there that you did not understand?

MR. FLORES: Yes.

THE COURT: So, as you stand before me now, have you had a--an adequate amount of time to discuss the document with him and to go over it so that you are fully aware of the contents of that document?

MR. FLORES: Yes.

THE COURT: All right. Are you presently under the influence of any alcohol or drugs today, Mr. Flores?

MR. FLORES: No.

THE COURT: When's the last time you had

any alcohol?

MR. FLORES: '95.

THE COURT: Pardon?

MR. FLORES: '95.

THE COURT: All right. When's the last time you had a controlled substance, prescribed or otherwise?

MR. FLORES: I don't have them.

THE COURT: You've never had a prescriptive medication that you've taken?

MR. FLORES: No.

THE COURT: Is there anything that would impair your ability to think clearly today, Mr. Flores?

MR. FLORES: No.

THE COURT: All right. So, you're thinking clearly today; is that correct?

MR. FLORES: Yeah. Yes.

THE COURT: All right. You've told me that you understand the contents of the statement that you've gone over with Mr. Kurumada. Do you understand that if you sign that statement, that what you will be telling me by your signature is that everything in that document is accurate and correct. Do you understand that?

MR. FLORES: Yes.

THE COURT: Have you made a voluntary

decision to sign this statement?

MR. FLORES: Yeah.

THE COURT: Yes or no. Don't say yeah.

MR. FLORES: Yes.

THE COURT: Yes or no?

MR. FLORES: Yes.

THE COURT: All right. If that's your voluntary decision, you may go ahead and indicate that by signing the statement and I'll receive it.

MR. FLORES: I don't want to do this.

MR. KURUMADA: Huh?

MR. FLORES: I ain't going to do this.

MR. KURUMADA: Can we have a minute, your Honor?

THE COURT: Yes. Would you like to go off the record for a minute?

MR. KURUMADA: Yes. Well, I--I think we need to go back--

THE COURT: All right. We'll be off the record for a minute or two.

(Off the record.)

THE COURT: Let me indicate that we're back on the record. All parties and counsel are present as I indicated before.

Mr. Flores has had an opportunity to discuss some

matters with Mr. Kurumada and I'll indicate for the record that Mr. Flores has executed the statement of defendant.

Before I receive that, let me just ask, Mr. Flores, if you had an opportunity to speak further with Mr. Kurumada--

MR. FLORES: Yes.

THE COURT: --and have him answer your questions?

MR. FLORES: Yes.

THE COURT: All right. And you've signed the statement of defendant freely and voluntarily; is that also correct?

MR. FLORES: Yes.

THE COURT: All right. And Mr. Kurumada, you're also convinced that Mr. Flores is going this knowingly and voluntarily?

MR. FLORES: Yes, your Honor.

THE COURT: All right. Let me ask Mr. Kurumada, to state a factual basis for the plea.

MR. KURUMADA: Yes. The--the elements of the crime with which he's charged are that the defendant, acting under circumstances evidencing a depraved indifference to human life engaged in conduct which created a grave risk of death to another and thereby caused the death of another, to-wit: Joseph Miera.

His conduct, as outlined in this plea agreement--or excuse me, in this affidavit of guilty plea, is that: "I, Miguel Flores, fired shots in the home occupied by Joseph Miera, thereby causing his death. These acts occurred on February 22nd, 1996, at 918 South Navajo Street, Salt Lake City, Salt Lake City/County, Utah."

THE COURT: And Mr. Flores, is that an accurate statement of what you did?

MR. FLORES: Yes.

THE COURT: Let me ask you some additional questions, Mr. Flores, about your Constitutional rights. If I say anything that you do not understand, will you let me know?

MR. FLORES: Yes.

THE COURT: All right. You understand, first of all, that you're not required to enter a guilty plea today or any other day. You have the right to proceed to trial and we have that trial set for tomorrow. Do you understand that right?

MR. FLORES: Yes.

THE COURT: You understand that if you proceed to trial, that you're presumed to be innocent and the only way that you can be convicted is if the State is able to prove each element of this offense beyond a reasonable doubt. Do you understand that?

MR. FLORES: Yes.

THE COURT: Specifically, in this case--Mr. Kurumada just went over the elements, but let me go over them with you, too, to make sure that you understand everything that the State would be required to prove.

And that is as follows: At 918 South Navajo in Salt Lake County, on or about February 22nd, 1996, that you, as a party to the offense, intentionally or knowingly caused the death of Joey Miera and/or intending to cause serious bodily injury to another, committed an act clearly dangerous to human life, that caused the death of Joey Miera and/or that you, acting under circumstances evidencing depraved indifference to human life, engaged in conduct which created a grave risk of death to another and thereby caused the death of Joey Miera.

Do you understand all of those elements that the State would be required to prove?

MR. FLORES: Yes.

THE COURT: All right. Do you understand also that you'd have the right to have a jury trial, and again, the only way you could be convicted is if all of the jurors unanimously agreed that the State had met this burden of proof?

MR. FLORES: Yes.

THE COURT: You understand that if you

proceeded to trial, you'd have the right to see the witnesses, face-to-face, who would testify against you and you'd have the right to have your attorney cross-examine them on your behalf?

MR. FLORES: Yes.

THE COURT: You also understand that at the time of trial, you'd have the right to present evidence to the Court and to the jury also that would include your own right to testify, if you chose to do so but that would be a voluntary decision that you could make, no one could force you to testify and if you chose not to testify, no one could draw any negative conclusions from that silence. Do you understand that right as well?

MR. FLORES: Yes.

THE COURT: Do you also understand that if you were convicted following a jury trial, that you'd have the right to appeal that conviction to an appellate court?

MR. FLORES: Yes.

THE COURT: Do you understand that by entering a guilty plea today, that you give up each of those rights that I've just asked you about?

MR. FLORES: Yes.

THE COURT: Are you pleading guilty to this charge because you're actually guilty of this offense?

MR. FLORES: Yeah.

THE COURT: Do you understand that this offense is charged as a first-degree felony that carries with it a term at the Utah State Prison of not less than five years, the term may be up to life, and it also carries with it a maximum fine of up to $10,000; do you understand that?

MR. FLORES: Yes.

THE COURT: Do you also understand that by adding what's commonly called the gang enhancement and that is the enhancement for offenses committed by three or more persons, that that adds an enhanced sentence, which means in effect that the minimum term at the Utah State Prison, instead of five years would be nine years, which could be up to life?

MR. FLORES: Yes.

THE COURT: Do you also understand that with the firearm enhancement, that the statute requires the Court to sentence you to an additional, that is a consecutive one-year term, the Court may sentence you to an additional indeterminate term up to five years?

MR. FLORES: Yes.

THE COURT: All right. Do you understand that the recommendations that have been made to me today by the prosecutor--give him a minute to get out--

all right.

Do you understand that I've heard some recommendations from the prosecutor today relative to sentencing? Do you understand that those recommendations are not binding on me; in other words, I will listen to them carefully, I will consider them, but I'm not required to follow them?

MR. FLORES: Yes.

THE COURT: All right. Has anybody promised you anything in return for this guilty plea?

MR. FLORES: No.

THE COURT: Has anybody threatened you or coerced you in any manner to get you to enter a guilty plea?

MR. FLORES: No.

THE COURT: Are you satisfied with the representation you've received from your attorney?

MR. FLORES: Yeah--yes.

THE COURT: Are there any other questions, Counsel, that either of you would have me pose to Mr. Flores before he enters his plea?

MR. YBARRA: I have none.

MR. KURUMADA: No, your Honor.

THE COURT: All right. I'll ask you to enter your plea at this time, Mr. Flores.

Will you waive a formal reading, Mr. Kurumada?

MR. KURUMADA: We would, your Honor.

THE COURT: And I believe that the statement of defendant acknowledges the portion of the Information that talks about acting under circumstances evidencing depraved indifference; is that the portion that we're proceeding under today?

MR. KURUMADA: That's correct. And that is in the statement.

THE COURT: All right. Mr. Flores, I'll ask you to enter your plea then. The charge before the Court is criminal homicide, murder, a first-degree felony, at 918 South Navajo in Salt Lake County, on or about February 22nd, 1996, with the allegation that you, as a party to the offense, acting under circumstances evidencing depraved indifference to human life, engaged in conduct which created a grave risk of death to another, and thereby caused the death of Joey Miera.

How do you plead to that charge, sir?

MR. FLORES: Guilty.

THE COURT: I do find, Mr. Flores, that your plea of guilty is knowingly and voluntarily made and will therefore receive it and enter it as a conviction at this time. I'll receive the statement of defendant that's been filled out.

I also want to tell you about two additional rights that you have, Mr. Flores. The first right is the right to ask the Court to let you withdraw your guilty plea, if you have good cause to do that; but any motion to withdraw your guilty plea has to be filed within 30 days of today's date. Do you understand that?

MR. FLORES: Yes.

THE COURT: You also have the right to be sentenced during a particular time period that begins three days from today and goes up to 45 days from today's date.

I note that you're awaiting sentencing on an earlier charge. I spoke to counsel about having the pre-sentence report prepared in connection with this offense also, so that A P & P could address both offenses at the same time. I suspect they'd be able to do it within the 45-day time period, but to the extent that it takes them any longer to complete that, are you willing to waive the maximum time for sentencing?

MR. FLORES: Yes.

THE COURT: Are you willing to also waive the maximum time for sentencing on the aggravated arson charge, because obviously, if I sentence you on both of them at the same time, that one will have to be further set over as well.

MR. FLORES: Yes.

THE COURT: All right.

Divania, what date would we use, if we give them--

THE CLERK: Well, we could do it January 13th, that's probably two days short (inaudible)

THE COURT: We can go with January 13th or we can go to the 27th. Divania tells me that the 13th is short of the 45 days, but I would guess that A P & P is already far enough along in preparing the other pre-sentence report that they've got the background information that we need, so I think we could probably do it on the 13th.

MR. YBARRA: I would suggest as well, your Honor, that is a probability.

MR. KURUMADA: That's fine.

THE COURT: All right. We'll set this matter for sentencing then on January 13th at 1:30. That will be on the regular criminal calendar.

Is there anything else that needs to be addressed today?

MR. KURUMADA: No, your Honor.

MR. YBARRA: I have no other matters.

THE COURT: All right.

MR. KURUMADA: Oh.

THE COURT: I'll receive that.

MR. YBARRA: Other than I assume you've

stricken the trial date tomorrow.

THE COURT: I will strike the trial date. Thank you for reminding me of that.

We'll be in recess.

MR. YBARRA: Thank you, your Honor.

(Whereupon, this hearing was concluded.)

* * *

TRANSCRIBER'S CERTIFICATE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, Toni Frye, do hereby certify:

That I am a transcriber for Alan P. Smith, Certified Shorthand Reporter and a Certified Court Transcriber of Tape Recorded Court Proceedings; that I received an electronically recorded videotape of the within matter and under his supervision have transcribed the same into typewriting, and the foregoing pages, numbered from 1 to 18, inclusive, to the best of my ability constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 17th day of May, 1997.

Transcriber

Subscribed and sworn to before me this 17th day of May, 1997.

NOTARY PUBLIC
ALAN P. SMITH
385 BRAHMA DRIVE
MURRAY, UT 84107
COMMISSION EXPIRES
DEC. 4, 1997
STATE OF UTAH

Notary Public

(S E A L)

REPORTER'S CERTIFICATE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, Alan P. Smith, Certified Shorthand Reporter, Notary Public and a Certified Court Transcriber of Tape Recorded Court Proceedings within and for the State of Utah, do certify that I received an electronically recorded videotape of the within matter and caused the same to be transcribed into typewriting, and that the foregoing pages, numbered from 1 to 18, inclusive, to the best of my knowledge, constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 21st day of May, 1997.

NOTARY PUBLIC
ALAN P. SMITH
385 BRAHMA DRIVE
MURRAY, UT 84107
COMMISSION EXPIRES
DEC. 4, 1997
STATE OF UTAH

Alan P. Smith
Notary Public

(S E A L)